



KOOTENAI COUNTY PUBLIC DEFENDER

October 26, 2020

Idaho State Public Defense Commission
816 W. Bannock, Suite 201
Boise, Idaho 83702
Phone: 208-332-1735
Fax: 208-364-6147

RE: Proposed Rules Published in the October 7, 2020 Administrative Bulletin

To Whom it May Concern:

I write in strong objection to the Public Defense Commission's proposed new rules. I appreciate the opportunity to express my opposition both in person at the public hearing; during the Zoom meetings on October 23, 2020. I continue to express my opposition now, in writing.

My experience in indigent defense provides context for my opposition. I began work as an indigent defender in 2004 working for John Adams in the Kootenai County Public Defender's Office. I have worked in private practice, both as a solo practitioner and as a partner in a law firm, during which I took conflict work for various counties as well as holding a conflict contract with Kootenai County. I am pleased to serve as Chief Public Defender for Kootenai County since 2017. I have a passion and love for indigent defense work and am honored to fulfil my duties in my role. Because of my experience and passion for indigent defense, I find it necessary to speak out about the proposed rules.

Since the creation of the Public Defense Commission, the agency has elected to create rules to improve Public Defense in Idaho through negotiated rule-making. Having participated

in several meetings, I firmly believe this is a good process. Collaboration provides optimal input for rules that impact an audience without a voice. Various interests and viewpoints come together during collaboration. The newly proposed rules did not undergo a meaningful negotiated rule-making.

During 2019, I attended a session for negotiated rule-making for two rules, Resource Equity and Independence. The discussion was robust and informative. At no time during that meeting did the current proposed version of these new rules come up. After the meeting in 2019 the two proposed rules were put on hold. Fast forward to 2020. In July of 2020, a negotiated rule-making meeting took place remotely. I attended that meeting and we discussed Resource Equity and Independence. It was during this meeting that we learned that the existing rules would be changed. I specifically asked if we would be made aware of the changes and have time to comment. Sometime thereafter, we were made aware of the rule changes through an email with the proposed rules attached. I was shocked because of the vast departure from the current rules as well as the lack of opportunity to have substantive and meaningful comment.

The Public Hearing on October 14, 2020 came 7 days after the official publication of the proposed rules. Between the time of the draft of the rules and the Public Hearing, there was no negotiated rule-making meeting. There was no collaboration. There was no exchange of ideas and expression of concern. I chose to travel to Boise and attend the hearing in person because the rule changes are significant and the implications of the rules affect the attorneys who choose indigent defense, the clients we serve and the counties we live in.

First, I believe it is important to acknowledge the positive impact the Public Defense Commission has had on public defense. Having worked in indigent defense prior to the creation of the Public Defense Commission, and then after the creation, two excellent changes stand out.

First, grant funding to improve defense is an immense help. Clients are better served with additional funding to hire experts, to have testing done, to obtain records to aid in case preparation, and to prepare exhibits for trial. Second, the workload study and associated funding has been extremely helpful. More attorneys mean a caseload that is much more manageable. Attorneys have more time in the workday to work on motions, meet with clients, and cover assigned case hearings. These changes have been beneficial in the defense of our clients.

I hoped that the next step would be good, robust trainings, specifically for indigent defense. Instead, the proposed new rules do not create help or partnership between the commission designed to improve public defense, and indigent defenders; rather, it creates time consuming scrutiny not visited on any other practicing attorney. The proposed new rules tread into the purview of the Idaho State Bar, the Judiciary, and violates Idaho Statutes. Equally concerning is the overall vague language. Words matter. Vague language lends itself to unpredictability and arbitrary and capricious application.

The proposed rules change the entire structure of statutorily established Public Defense in Idaho. As a whole, it is difficult to see how the new rules protect the Constitutional guarantee for indigent clients. It is difficult to see how the answer to the ACLU lawsuit lies in the new proposed rules. It is difficult to see how this re-write is within the Governor's directive in his Zero Based Regulation Executive Order No. 2020-01 signed on January 16, 2020. It is easy to see centralization of control resting in the hands of one person. It is easy to see conflict with established statute and proposed rules. It is easy to see costs and expenses that will break county budgets. It is easy to see ambiguity and unpredictability. It is equally easy to envision good, qualified attorneys deciding the level of compliance enforcement is too much.

I want to provide an example of a rule change and the problems that result from the proposed new rule. The following discussion is meant to provide an example, rather than an exhaustive list of my concerns. The issues I see are widespread. My concerns grow each time I read the new proposed rules as compared to the existing, negotiated rules. I reiterate the request I made during our October 23, 2020 Zoom meeting; please put the entire set of new rules on hold until we have the opportunity to work with them through the negotiated rule-making process.

I would like to discuss the Public Defense Roster. The change in functionality of the Public Defense Roster reaches into the duties of the counties and their appointed Chief Public Defender. Currently the Public Defense Roster is covered by two rules:

Rule 61.01.01.021

01. Roster Membership. The PDC will create and maintain a roster of all indigent defense providers, defending attorneys and non-attorney staff under their regular employ or supervision.
02. Application for Inclusion. **Any attorney who is not employed by an indigent defense provider, or who does not work under an existing indigent defense services contract** may apply to the PDC for inclusion on the Public Defense Roster. (Emphasis added)
 - a. Approval. Inclusion on the Public Defense Roster must be approved by the Executive Director.

This rule, does not conflict with Idaho Statute tasking counties with choosing a Chief Public Defender. It does not conflict with Idaho Statute tasking Chief Public Defender's with choosing and retaining deputy Public Defenders.

The PDC extended the rule in 2018.

Current Rule 61.01.07.020

01. Public Defense Roster Membership. The PDC will create and maintain a roster of all indigent defense providers, defending attorneys and non-attorney

staff under their regular employ or supervision who are compliant with current Indigent Defense Standards.

02. Application for Public Defense Roster Inclusion. **Any attorney who is not employed by an indigent defense provider, who does not work under an existing indigent defense services contract**, or who has become compliant after a period of non-compliance with Indigent Defense Standards, may apply to the PDC for inclusion on the Public Defense Roster. (Emphasis added)

- a. Approval. Inclusion on the Public Defense Roster must be approved by the Executive Director.

Both current rules with respect to the Public Defense Roster do not conflict with autonomy in the various counties to employ Chief Public Defenders and Deputy Public Defenders. Under the current rule, if an attorney is hired to work as a Chief Public Defender or as a Deputy Public Defender, that attorney is included on the roster. The rules and standards apply to that person. But the initial criteria for work in public defense is up to the various counties and Chief Public Defenders, and not in conflict with Idaho Code. The same is not true with the proposed new rule:

Proposed Rule 61.01.02

070. ROSTER REQUIREMENTS AND PROCEDURES:

01. Defending Attorney Roster.

- a. For inclusion on the Defending Attorney Roster, attorneys must:

- i. Have an active license to practice law in Idaho;
- ii. Attest they are in compliance with the Public Defense Rules or will

comply with the Rules when appointed and representing Indigent Person;

iii. New attorneys admitted to the Idaho State Bar within the previous year will name and be mentored by an experienced Defending Attorney on the Defending Attorney Roster;

iv. Have completed the minimum continuing legal education (“CLE”) requirements in Paragraph 090.03 of these rules within the previous year of being placed on the Roster or within the next (60) days;

v. Have completed the Defending Attorney Roster application and authorization forms.

vi. Attorneys on the Defending Attorney Roster will complete Annual Reports as set forth in IDAPA 61.01.03, “Records, Reporting and Review,” Paragraph 020.01.a. Attorneys who at the time of inclusion on the Defending Attorney Roster are not under contract with a county will promptly provide PC Staff notice and copy of any county contracts entered after inclusion.

b. The Executive Director will decide whether an attorney is included on the Defending Attorney Roster;

c. Continuing Eligibility. To remain on the Defending Attorney Roster attorneys must comply with the Public Defense Rules and:

i. Have completed the minimum CLE requirements under subsection 090.03 of these rules; and

ii. Have completed an Annual Report.

d. The Executive Director will remove attorneys who do not meet continuing eligibility requirements from the Defending Attorney Roster.

The proposed new rule changes the existing rule. The existing rule includes anyone employed by an established office or holding a contract for public defense. Under the proposed new rule a new attorney hire would be subject to approval by the Executive Director. The new, proposed rule, requires counties to hire from the Defending Attorney Roster, or cause a new hire to apply for the Roster. (Proposed IDAPA 61.01.02.020.01.) The rule grants one person the power of removal. Thus, giving the Executive Director the authority and power to endorse or remove a county chosen hire contradicts Idaho Code 19-860 and Idaho Code 19-861.

19-860. PUBLIC DEFENDER — COMPENSATION — APPOINTMENT — QUALIFICATIONS. If the board of county commissioners of a county elects to establish and maintain an office of public defender and/or juvenile public defender or a joint office of public defender, the board shall:

(1) Prescribe the qualifications of such public defender and his rate of annual compensation, and, if so desired by the board, a rate of compensation for extraordinary services not recurring on a regular basis. So far as is possible, the compensation paid to such public defender shall not be less than the compensation paid to the county prosecutor for that portion of his practice devoted to criminal law.

(2) Provide for the establishment, maintenance and support of his office. The board of county commissioners shall appoint a public defender and/or juvenile public defender from a panel of not more than five (5) and not fewer than three (3) persons, if that many are available, designated by a committee of lawyers appointed by the administrative judge of the judicial district encompassing the county or his designee. To be a candidate, a person must be licensed to practice law in this state and must be competent to counsel and defend a person charged with a crime

19-861. PUBLIC DEFENDER'S OFFICE — EMPLOYEES — COMPENSATION — FACILITIES. (1) If an office of public defender or a joint office of public defender has been established, the public defender may employ, in the manner and at the compensation prescribed by the board of county commissioners, as many assistant public defenders, clerks, investigators, stenographers, and other persons as the board considers necessary for carrying out his responsibilities under this act. A person employed under this section serves at the pleasure of the public defender.

For decades, Idaho law has tasked the counties with selecting and overseeing their Chief Public Defender, and further tasked that Chief Public Defender with overseeing other attorneys and staff to carry out the Constitutional duty of indigent defense.

The current Public Defense Commission Rule tasking the Commission with maintaining a Public Defense Roster provides inclusion on the roster if an attorney has been selected as a Chief or Deputy Public Defender; or the recipient of contract public defense work. The proposed rule undermines the statute. The proposed new rule grants sole authority to one person to control who may be employed as a Chief Public Defender or Deputy Public Defender.

The proposed rule intrudes upon the management of an established office. The proposed rule goes well beyond setting standard for indigent defenders and beyond statute:

Idaho Code 19-850 (a)(vii) Standards for defending attorneys that utilize, to the extent reasonably practicable taking into consideration factors such as case complexity, support services and travel, the following principles:

1. The delivery of indigent defense services should be independent of political and judicial influence, though the judiciary is encouraged to contribute information and advice concerning the delivery of indigent defense services.
2. Defending attorneys should have sufficient time and private physical space so that attorney-client confidentiality is safeguarded during meetings with clients.
3. Defending attorneys' workloads should permit effective representation.
4. Economic disincentives or incentives that impair defending attorneys' ability to provide effective representation should be avoided.
5. Defending attorneys' abilities, training and experience should match the nature and complexity of the cases in which they provide services including, but not limited to, cases involving complex felonies, juveniles and child protection.
6. The defending attorney assigned to a particular case should, to the extent reasonably practicable, continuously oversee the representation of that case and personally appear at every substantive court hearing.
7. There should be reasonable equity between defending attorneys and prosecuting attorneys with respect to resources, staff and facilities.
8. Defending attorneys should obtain continuing legal education relevant to their indigent defense cases.
9. Defending attorneys should be regularly reviewed and supervised for compliance with indigent defense standards and, if applicable, compliance with indigent defense standards as set forth in contractual provisions.

10. Defending attorneys should identify and resolve conflicts of interest in conformance with the Idaho rules of professional conduct and other applicable constitutional standards.

The proposed rule, at IDAPA61.01.02.060 reads as follows:

60. MINIMUM REQUIREMENTS FOR DEFENDING ATTORNEYS.

Defending attorneys shall meet the following minimum requirements for providing effective representation to indigent persons.

1. **Idaho State License.** Be licensed to practice law in Idaho and comply with Idaho State Bar rules.
2. **Public Defense Competency.** Be competent to counsel and represent Indigent Persons.
3. **Qualifications.** Have demonstrated ability, training, experience and understanding regarding representing Indigent Persons and do the following:
 - a. Apply laws, rules, procedures and practices to the case and perform thorough legal research and analysis;
 - b. Protect client confidentiality, and if breached, notify the client and any other entities when necessary to preserve the client's constitutional and statutory rights;
 - c. Ensure Vertical Representation from the time a Defending Attorney is appointed in each Case. Defending Attorneys who are unable to comply with this rule will notify their supervisor, Board of County Commissioners or the Court and request appropriate resources;
 - d. Dedicate sufficient time to each Case;
 - e. Promptly and independently investigate the Case;
 - f. Request funds as needed to retain an investigator;
 - g. Request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case;
 - h. Continually evaluate the case for defense investigations or expert
 - i. Be present at the initial appearance and available to the Indigent Person in person or via technology and;
 - i. Preserve the client's constitutional and statutory rights;
 - ii. Discuss the charges, case and potential and collateral consequences with
 - iii. Obtain information relevant to Idaho Criminal Rule 46 (bail or release on own recognizance) and if appropriate, seek release;
 - iv. Encourage the entry of a not guilty plea at initial appearance except in extraordinary circumstances where a guilty plea is constitutionally appropriate;

j. Work within Caseload or Workload limits, defined in Subsection 060.05 of these rules. If a Defending Attorney's Caseload exceeds the numeric standard, the attorney must disclose this in the Annual Report. The Report must include the reasons for the excessive Caseload or Workload, and if and how the representation met constitutional standards;

k. Have sufficient time and private space to confidentially meet with Indigent Persons;

l. Have private and secure information systems to confidentially access and store Indigent Person's confidential information;

m. Identify and resolve conflicts of interests in compliance with Idaho Rules of Professional Conduct (IRCP) and other applicable laws and rules;

n. Be familiar with and competent to identify or use:

i. Forensic and scientific methods used in prosecution and defense;

ii. Mental, psychological, medical, environmental issues and impacts;

iii. Written and oral advocacy;

iv. Motions practice to exhaust good faith procedural and substantive

v. Evidence presentation and direct and cross examination;

vi. Experts as consultants and witnesses and expert evidence;

vii. Forensic investigations and evidence;

viii. Mitigating factors and evidence;

ix. Jury selection methods and procedures;

x. Electronic filing, discovery and evidence and systems;

xi. Quality and zealous representation; and

xii. Understand their own professional limitations and seek the advice of experienced attorneys or decline appointments when necessary.

The proposed rule contains minimum requirements, which are far more extensive than the standards outlined in the statute. Certainly, the written requirements are what I want to see in any attorney. These minimum requirements are what I expect our Deputy Public Defenders to do, and what is expected of me. However, much of the list are terms subject to much interpretation. This list is tied to being on the Defending Attorney Roster. That means that at a single person's discretion an attorney can be removed from the roster for any of the aforesaid minimum requirements, which are very subjective. When an attorney is up to renew inclusion on the roster, will they be required to demonstrate how the minimum

requirement was met? If they do not demonstrate such to a single person's satisfaction will they be removed? Must I then terminate their employment?

The minimum requirements, while providing a list of things attorneys need to know and do, are as apt to be used as a hammer as they are a goal to improve indigent defense. Things like use sufficient time to investigate a case, and being competent to provide quality and zealous representation are required, but how will each attorney be measured? How will an attorney have any security in their job?

If adopted, the public defense roster and accompanying dictates will completely change the current system. How an attorney is included or may be subject to removal is a decision by one person. I agree it is imperative to employ qualified attorneys; qualified attorneys are vital to a Constitutional defense. It is important to recognize that qualified attorneys generally grow into their role. It takes time to gain experience, it takes commitment to train an attorney. Attorneys are a resource in the delivery of defense; a resource that is not always easy to come by. As a Chief Public Defender it is necessary to have the ability to employ and retain attorneys. It is not always easy to attract a good viable candidate. Public Defense work is challenging work. It is work that requires intelligence and skill and fortitude. The work requires a high level of preparedness and stamina. A Deputy Public Defender needs to know they are on a solid ground with their supervisor and have a sense of job security.

The proposed new rule, placing in one person's hands, the authority to say who is good enough and who is not good enough to be a public defender flies in the face of Idaho statutory authority for that assessment to be held by an appointed public defender. The current rule covers the established standards in the Idaho Code and yet honors statutes outlining authority in the counties and appointed Public Defenders.

The proposed new rule contains a new definition of Vertical Representation. In the proposed new rule, it is part of the rule as a Minimum Standards, one that must be adhered to or one can be removed from the Defending Attorney Roster. The new definition is a departure from the current rule, standard, statute and ABA definition. By incorporating the new definition into the minimum standards, and tying it to being on the Defending Attorney Roster, leaves enforcement of vertical representation to one person.

The minimum requirement of vertical representation, as defined by the proposed new rule is not possible for each attorney to perform. Vertical representation, as defined by the proposed rule states:

IDAPA 61.01.01.010.22 Vertical Representation. The Defending Attorney who is appointed by a court to represent an Indigent Person shall continually and personally represent that client through trial proceedings and the preservation of issues for appeal. Limited exceptions can be made in the event of the appointed attorney's illness, other unavoidable absence or for coverage on a strictly procedural issue.

Vertical representation, as defined by the American Bar Association, Idaho Statute and the current Public Defense Commission Standards are appropriate. Idaho Code 19-850 and the Standards for Defending Attorneys are identical. Both state "A defending attorney assigned to a particular case should, to the extent reasonably practicable, continuously oversee the representation of that case and personally appear at every substantive court hearing." That standard has been utilized by the ABA, the PDC and by Idaho attorneys for years now.

Continuity for clients is very important. An attorney should be assigned a case and work with the client from start to finish. It is appropriate to have the assigned attorney cover every possible hearing for their client. The proposed new definition leaves no room for court

scheduling conflicts. The proposed new rule would impact the ability of an assigned attorney helping one client with several cases that may involve more than one judge. The proposed new rule definition does not allow for vacation time away from the office. The proposed new rule does not take into account other reasons the assigned attorney may be unavailable. It is untenable to think an attorney could be removed from the roster because of a situation outside of their control.

The new, proposed rules are a stark change from the negotiated rules that currently exist. The history of this re-write is very short and without robust discussion and input of people that are on the front lines delivering advocacy daily; and without input of the voices of the people elected, and statutorily tasked with providing access to and funding for indigent defense. I am strongly opposed to the proposed rule re-write. They are contrary to statute, broad, vague and arbitrary. They overstep boundaries of the Judiciary and the Idaho State Bar. The rules will create uncertainty for those employed as Indigent Defenders.

The proposed new rule is a centralization of authority in a public defense system that tasks the various counties with funding and running it. Such a drastic change, centralizing and essentially moving toward a state run system should be done through legislation, rather than an end run with rulemaking.

Respectfully,

A handwritten signature in black ink, appearing to read 'Anne C. Taylor', with a stylized, flowing script.

Anne C. Taylor,
Chief Public Defender for Kootenai County